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In the Supreme Court of the United States

OCTOBER TERM, 1960 61

BUFORD MALONE, JR., PETITIONER

v.

JAMES A. BOWDOIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Cavanaugh v. *Long*, 252 F. 2d 959, affirming *Cavanaugh* v. *McKenzie*, 159 F. Supp. 555 — 7, 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Buford Malone, Jr., as Forest Service Officer, Department of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the district court (R. 20–23) is reported at 186 F. Supp. 407 under the name *Doe* v. *Roe*. The opinions of the court of appeals (App., *infra*, pp. 1a–23a, 24a–31a) are reported at 284 F. 2d 95 and at 287 F. 2d 282.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1960. A timely petition for rehearing *en banc* was denied on February 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

infra). It is true that the Court in the *Larson* opinion merely distinguished, rather than overruled, those cases, but it "distinguished" them in a way which deprived them of whatever applicability they might otherwise have had to the facts of this case.[2] *Lee* was distinguished as involving a taking of property without just compensation—there being at that time no remedy for the recovery of just compensation—and thus an unconstitutional action.[3] 337 U.S. at 696–697. *Dollar* was distinguished on the ground that it was there claimed that the action violated a statutory limitation on the officers' authority. 337 U.S. at 702, note 26. So interpreted, *Lee* and *Dollar* admittedly afford no support for the decision below, and in rejecting that interpretation (expressly as to *Lee*, see pp. 7a–8a, 12a, *infra*) the court of appeals again comes into conflict with the *Larson* ruling.

Not even the court of appeals seems confident of its distinctions of *Larson*, and its underlying view of the matter is evident from its final explanation of that case (pp. 19a–20a, *infra*):

> * * * At all events, whatever language of *Larson* seems to conflict with *Lee* and *Dollar* is explainable under this pungent paragraph in Mr. Justice Frankfurter's dissent [337 U.S. at 713]:

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[2] For purposes of this petition, it is unnecessary to reach the question whether the *Lee* and *Dollar* cases would support the decision below even apart from their limitation by the *Larson* decision.

[3] In this case, if there was a taking of respondents' property, they have a remedy under the Tucker Act, 28 U.S.C. 1346(a), 1491, by which Congress waived immunity and authorized a suit for damages, but not for specific relief.

> "These cases likewise apply a principle that is clear. There is an appearance of inconsistency in some of the cases only because opinions also are prey to the frailties of composition. Familiar phrases are not always used with critical precision or with due relevance to the circumstances of a particular case."

This is but a direct challenge to the rationale of the *Larson* opinion, which the court concludes it need not follow because the facts of this case are different. We readily concede that the facts are different, and *Larson* could probably have been decided on grounds having no application to this case. The fact remains, however, that this Court chose to decide it on the broader grounds, relying only on the aspects of that case which are common to this case—namely, the allegation of a tortious withholding of possession of property belonging to the plaintiff. The conclusion that a suit for specific relief from such an alleged wrong is a suit against the sovereign so long as the officer is acting within the scope of his delegated powers was thus the *holding* of the Court, and the decision below is in square conflict with that holding.

2. The decision is also in conflict with rulings of the Sixth and Ninth Circuits in *Andrews* v. *White,* 221 F. 2d 790 (C.A. 6), and *Cavanaugh* v. *Long,* 252 F. 2d 959 (C.A. 9), affirming *Cavanaugh* v. *McKenzie,* 159 F. Supp. 555 (D. Nev.). In the *Andrews* case, an action was brought against Forest Service Officers to enjoin them from trespassing upon land to which the

plaintiffs claimed title.[4] The Sixth Circuit, recognizing that the relief sought would interfere with the administration by the United States of property claimed by it and that the officers were acting within their delegated powers, held that the action was an unconsented suit against the United States, citing *Larson*. In the *Cavanaugh* case, the action was for specific relief against the commanding officer of a military base for obstructing a road over which the plaintiff claimed an easement. There being no claim that the officer was acting beyond his statutory authority, the action was again held to be against the United States under the *Larson* holding.

3. The question in this case is one of evident importance. The United States owns more than 407 million acres of land as part of the public domain or which have been acquired by purchase, condemnation, or otherwise. S. Doc. 100, 84th Cong., 2d Sess., p. 55. Adverse claims are constantly being asserted and the question of sovereign immunity from suits for specific relief is a recurring one. Unlike suits for money damages, suits for specific relief would, as this Court recognized in the *Larson* decision (see 337 U.S. at 703–705), seriously interfere with the execution of important governmental programs. The conflict between the decision below and the decisions of this Court and of the Sixth and Ninth Circuits should be resolved.[5]

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[4] The district court had alternatively construed the complaint as sounding in ejectment, in which form it was equally held to be barred. 121 F. Supp. 570, 573 (E.D. Tenn.).

[5] The decision below has already been relied upon by one district court in denying a motion to dismiss an action against

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

MAY 1961.

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officers of the Army Corps of Engineers, the court observing that "it is sometimes possible to escape the doctrine of sovereign immunity and thereby compel or enjoin governmental action by suing an individual government official." *Miracle* v. *Jacoby, et al.*, W.D. Ark., Civil No. 1574, March 30, 1961 (unreported).

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 18222

JAMES A. BOWDOIN, ET AL., APPELLANTS

v.

BUFORD MALONE, JR., AND UNITED STATES OF AMERICA, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

(October 25, 1960)

Before RIVES, *Chief Judge,* and CAMERON and BROWN, *Circuit Judges*

CAMERON, *Circuit Judge:* Appellants James A. Bowdoin, et al. filed an action in ejectment in a Georgia state court in the fictitious form of *John Doe* v. *Richard Roe,* as provided by the statutes of Georgia.[1] Personal service was had upon appellee Buford Malone, Jr., by the sheriff of Jasper County, Georgia; service upon the United States was attempted by mailing copies of the petition to the Attorney General of the United States and to the United States Attorney, thus revealing that the "true

[1] Vol. 12, Code of Georgia, Annotated, Title 33, § 111: "*Consent Rule. Fictitious forms in pleading.*—The consent rule in ejectment shall always be considered as filed, and admits lease, entry, and ouster. The fictitious forms in pleading in ejectment shall be sufficient." Cf. *Horn* v. *Towson*, S. Ct. Ga. 1926. 135 S.E. 487.

claimants" were the appellees Buford Malone, Jr., and the United States of America.

The appellees removed the case to the United States District Court, where they moved to dismiss the complaint for failure to state a claim upon which relief could be granted; because the state court did not have jurisdiction over the United States or Malone, and the United States had not consented to be sued or waived its immunity from suit; and because Malone was being sued "as an agent and employee of the United States, and, as to him, the suit is in substance and effect one against the United States; thus the United States is an essential and indispensable party to the suit."[2]

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[2] Neither in the motion nor in appellees' brief is it argued that the petition filed by appellant was in any way insufficient to bring the appellees within the scope and protection of the statutes of Georgia, some of which are quoted here:

12 Code of Georgia Annotated, Title 33, § 102: "*Plaintiff may recover on his prior possession, when.*—A plaintiff in ejectment may recover the premises in dispute, upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry and without any lawful right whatever."

Ib. Title 33, § 104: "*Mesne profits, how recovered.*—The plaintiff in ejectment may add a count in his petition, and submit the evidence to the jury, and recover by way of damages all such sums of money to which he may be entitled by way of mesne profits, together with the premises in dispute."

Ib. Title 33, § 114: "*True claimant made defendant; effect of judgment.*—A plaintiff in ejectment may in all cases make the true claimant defendant by serving a copy of the pending action upon him, and the person so notified shall be bound by the judgment."

Ib. Title 33, § 120. "*Writ of possession; issuance; contents.*—When a verdict in ejectment shall be rendered in favor of the plaintiff, and a judgment entered thereon, the clerk of the superior court shall issue a writ of possession, in which the clerk shall incorporate a clause directing the sheriff to collect,

The entire argument of both litigants assumes that the uncontroverted averments of the petition of the appellants are sufficient to require answer by the appellee Malone and to a trial, unless the court below properly granted his motion, as well as that of the United States, to dismiss because of want of jurisdiction. Both parties conceded in the trial court and before us that the United States was not legally before the Court and that the action against it should be dismissed. The sole question remaining, therefore, is whether this statutory action in ejectment states a claim against appellee Buford Malone, Jr., Forest Service Officer, United States Department of Agriculture, whose official duties required him to be, and who was in fact, in charge and possession of the land described in the ejectment action under color of his office representing the United States.

The court below granted Malone's motion to dismiss on the ground "that the Court has no jurisdiction over Malone since the proceeding is in substance and effect against the United States and that the United States has not consented to be sued or waived its immunity from suit."[3]

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by levy and sale of the defendant's property, all such sums of money shall have been awarded to such plaintiff in ejectment as mesne profits and costs."

Ib. Title 33, § 121: "*Against whom writ of possession may issue.*—The writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, nor put in possession by, or claiming under or by virtue of any conveyance from the defendant in such suit."

[3] The court's reasons were thus amplified in its written opinion: "This Court finds itself in agreement with the following statement in the opinion of Judge Gilliam in the case of *Jones* v. *United States*, 127 F. Supp. 31, 33 (E.D. N.C. 1954):

"'However, in my opinion, *United States* v. *Lee* has been severely limited by Larson [*Larson* v. *Domestic and Foreign*

It is manifest that the court below did not base its decision on what the District Court for the Eastern District of North Carolina *did* in the *Jones* case, but adopted only a portion of what the district court there *said*. The fact is that the *Jones* suit involved, not only ejectment, but partition of lands in which Jones claimed to own a two-thirds interest, which the United States had taken without paying compensation under the Fifth Amendment. It appears from the decision that Dennis, the agent in charge of the tract of land, did not move to dismiss and did not ask summary judgment. Only the United States filed such motions. The final paragraph of *Jones* (127 F. Supp. 33) shows the action taken by the court in that case: "It does not clearly appear that this Court has no jurisdiction to entertain the case in any of its aspects, and the court, therefore, denies both motions of the United States to dismiss as upon summary judgment."

We will not, however, confine this opinion to differentiating the *Jones* case from the case before us, as the argument of appellees is pitched upon the assumption that, if the *Lee* case has not been entirely overruled, "there may be no cases at all in which *United States* v. *Lee* will permit suit today"—as was said in *Jones* and apparently adopted by the court below.

Commerce Corp., 337 U.S. 682, 93 L. Ed. 1628 (1949)], and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which *United States* v. *Lee* will permit suit today.'

"The key to the possible distinction between Lee and Larson is contained in footnote 17 to Larson, pointing out that Lee was decided in 1882 before the enactment of the Tucker Act, which was enacted on March 3, 1887. * * *

"Accordingly, the defendants' motion to dismiss will be granted, and counsel for the defendants may prepare and submit an appropriate order."

In comparing the case before us with decisions in other cases which will be discussed, and in determining whether the facts here come within the holding of *United States* v. *Lee*, 1882, 106 U.S. 196—much watered down under the opinion of the court below and the argument of appellee here—we must follow the general rule:[4] "'* * * that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. * * * Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.'" This makes it necessary that the salient portions of the petition be set out.[5]

Under this petition and the statutes of Georgia above quoted it is apparent that appellants would be able to prove: That they were, on the crucial dates, the true owners of such title to the lands involved as would support the leasehold interest they sought to

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[4] Stated by us in *Des Isles* v. *Evans, et al.*, 1952, 200 F. 2d 614, 615–616.

[5] "The petition of John Doe [James A. Bowdoin, et al] shows that Richard Roe [Buford Malone, Jr.] has damaged him in the sum of Twenty-five Thousand Dollars: for that on January 1, 1953. James A. Bowdoin [and nine others] demised to your petitioners for the term of 50 years from said date the following lands in said County, to-wit:

"* * * and your petitioner duly entered thereon under said lease and afterwards on December 1, 1953, said Richard Roe forcibly ejected and ousted your petitioner from said lands and the possession thereof.

"Wherefore your petitioner prays that process issue requiring said Richard Roe to be and appear at the next term of the Superior Court of said County to answer this complaint as provided by law."

establish; that the United States did not own any title to the lands which would defeat appellant's claims; that appellee Malone was in wrongful possession of said lands as agent of a principal which did not have any claim thereto, and that he had ousted appellants of their rightful possession; and that, based upon said tortious acts of appellee Malone, appellants are entitled to money damages and the possession of the land during the claimed term of the leasehold."

It is manifest from the Georgia statutes quoted and referred to, as well as the decisions cited, that the common law action of ejectment in Georgia involves possession alone, that the only process issuable to the victor is a writ of possession, together with damages, and that "the writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, * * *" The sole question presented, therefore, is one of law: is appellee Malone, under the admitted facts, entitled to have the action against him dismissed solely on the ground that he is protected by the asserted sovereign immunity of the United States?

If the *Lee* case is still the law applicable to ejectment suits of this character, it is plain that the complaint before us states a claim upon which relief can be granted, and that the appellee Malone is not protected by any sovereign immunity of the United

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"*Kaufman* v. *Deese*, S. Ct. Ga., 1949, 205 Ga. 841, 55 S.E. 2d 358, and *Vinson* v. *Cannon*, S. Ct. Ga., 1957, 213 Ga. 339, 99 S.E. 2d 108. In the latter decision the general rule is stated, at page 109 of 99 S.E. 2d.

"Needless to say the fictitious forms of pleading in ejectment are still the law in this State, with defendant admitting the lease and entry of the plaintiff and his ouster by the defendant from the lands involved. Code § 33-111; Code Ann. Supp. § 24-3344. * * * The purpose of the action is to eject the defendant from possession of the land involved. * * *"

States which may be present in such circumstances. Indeed neither the court below nor appellee's counsel seem to question this statement. If they did, the *Lee* case would reject their argument entirely, because the fact of the *Lee* case and those of the present case are identical in their legal effect. A comprehensive look at the *Lee* case is indicated.[7]

The Arlington estate of General Robert E. Lee had, during the War Between the States, been seized for nonpayment of taxes. Under the jury's findings these taxes had in fact been tendered by a friend, but the tax collector had interpreted his authority as permitting payment of the taxes only by the record owner. After the United States had seized the lands, it established a fort and cemetery thereon. The plaintiff, in whom title to the land vested if its seizure could not be justified, brought an action of ejectment against the agents of the government in possession of the estate. The trial court overruled the suggestion of the Attorney General of the United States that the trial court was without jurisdiction, based on the ground that the property was in the possession of the United States. The ejectment action was tried to a jury, which found against the government agents, deciding that the attempted proof did not establish title in the Government and that the agents' possession was not, therefore, legally justified. The Supreme Court affirmed, holding that the lower court was competent to decide the issues between the parties without the presence of the United States whose consent to be sued had been withheld.

A close reading of *Lee* reveals that, although some of the language of the opinion referred to taking property without just compensation, its real basis was that the government agents were ordinary tort

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[7] 106 U.S. 196.

feasors, not immunized for their wrongful trespass upon the plaintiff's property by the fact that they claimed to be acting on behalf of the government. It was admitted that Kaufman, Strong, et al. who were actually holding the land were doing so as agents in possession of the property of the United States. A few excerpts from the exhaustive *Lee* opinion will suffice to epitomize its holdings:

> This proposition [that the court can render no judgment for the plaintiff and against the defendants because they hold the property as officers and agents of the United States, and that the property was appropriated to lawful public uses] rests on the principal that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents of the government. * * * [106 U.S. p. 204]
>
> On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit. * * * [ib. pp. 207–208]
>
> Under our system the *people*, * * * are the sovereign. * * * The citizen here knows no persons, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has

established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. * * * [pp. 208–209.]

The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. * * * in this case * * *, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States. * * * [Ib. p. 210.]

"* * * The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; * * * This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit * * *" [Ib. p. 213.]

This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, * * * [Ib. pp. 215–216.]

That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided. * * * [Ib. p. 217.]

It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery. * * * [Ib. p. 219.]

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. * * * [Ib. p. 220.]

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, * * * the unsuccessful

party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen. * * * [Ib. p. 221.]

Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, * * * the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. *Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.* * * * [Emphasis supplied—Ib. pp. 222.]

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is Affirmed.

From these excerpts it is clear that the *Lee* case went considerably farther than the court below was asked to go in this case. Admitting that the United States was not properly made a party and that it would not be bound by the judgment,—a principle established also by Georgia Statutes in Footnote 2, *supra*—appellants sought, by a proper judicial proceeding, merely to have interlopers put off of their land by an action at law in ejectment. If *Lee* has

any vitality at all, the judgment of the court below must be reversed.

And what of *Lee*? Has it ever been overruled by the Supreme Court? The court below did not so hold and appellee's argument does not directly make such a contention. All the court below said was, quoting from a six year old district court decision, that *Lee* "has been severely limited by Larson, and with the possibility of the landowner recovering just compensation for the wrongful taking, there may be no cases at all in which *United States* v. *Lee* will permit suit today." A study of the cases decided both before and after the one the court below quoted from will demonstrate that the latter portion of the quoted statement is entirely without foundation.

Examination of Shepard's United States Citations reveals that the *Lee* case has been cited three hundred ninety-six times. It has appeared in decisions of the Supreme Court fifty-eight times in seven of which it has been "distinguished," and in four "explained." It would seem from this that the editors of Shepard's consider that, in the remaining forty-seven cases, no fault has been found with *Lee*. It should be noted in passing that, where the Supreme Court has "distinguished" the *Lee* case, it has compared it with the case then before the court and has decided that *Lee* was inapplicable, because its facts did not control those of the case under consideration. With respect to the quoted statement of the court below that the possible distinction between *Lee* and *Larson* was that *Lee* was decided in 1882 before the enactment of the Tucker Act in 1887, it should be noted that fifty of the fifty-eight Supreme Court decisions referred to *supra* have been decided since March 3, 1887 and also that this contention was specifically rejected in *Dollar*, *infra*.

Probably the most significant point about this phase of the argument is that nobody has suggested that there is any authoritative holding that the *Lee* case does not now cover ejectment suits just as fully as it did the day of its rendition. The argument that its application has been severely limited has arisen when the principles of *Lee* was sought to be applied to other and often quite different situations, governed by entirely different rules of law. A reading of those cases will reveal also that there have been no clear-cut distinctions between the facts to which *Lee's* principles apply and those to which it does not apply—no blacks and whites, only varying shades of gray.

Mr. Justice Frankfurter, in his dissent in the *Larson* case,* has done a masterful job of analyzing a large number of the cases dealing with the principles of Lee and assigning them to categories and sub-categories in an effort to draw the line as distinctly as varying facts will permit. Starting with the statement (P. 706): "There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict," he asserts that some of the confusion "is doubtless due to the fact that a steady change of opinion has gradually undermined unquestioned acceptance of the sovereign's freedom from ordinary legal responsibility. * * * In the course of a century or more a steadily expanding conception of public morality regarding 'governmental responsibility' has led to a

* 337 U.S. 705–732.

'generous policy of consent for suits against the government' to compensate for the negligence of its agents as well as to secure obedience to its contracts." [Pp. 708-709.] And, as further support of his statement, he cites the speed with which the Eleventh Amendment was passed after the Supreme Court's decision in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), along with the cases of *New Hampshire* v. *Louisiana,* 108 U.S. 76, 86-88; *Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 396, and *Federal Housing Administration* v. *Burr,* 309 U.S. 242, 245, where the Supreme Court held that the doctrine of sovereign immunity was in disfavor, as well as Borchard's bibliography in 20 A.B.A.J. 747, 748, and the materials in Judge Mack's opinion in *The Pesaro,* 277 F. 473, reversed, 271 U.S. 562. To these might be added the several Acts in which Congress has specifically withdrawn sovereign immunity, such as the Federal Tort Claims Act, 28 U.S.C.A. § 2671, et seq., Federal Old Age, Survivors and Disability Insurance Benefits Act, 42 U.S.C.A. § 405(g), and I.R.C. 1954, § 7422, et seq.

We will not attempt a general discussion of the cases, referring instead to Mr. Justice Frankfurter's dissent *supra* as presenting a fair and exhaustive examination of the leading cases.

The court below cites in its opinion as authority for the judgment rendered, a case from this Court, *Rambo* v. *United States,* 145 F. 2d 670, 671 (1945), certiorari denied, 324 U.S. 848, 89 L. Ed. 1408 (1945). It quotes from that decision this sentence: "The United States has not consented to be sued in the District Court of the United States in suits to try title to lands claimed by it where the plaintiff is not in possession and his claim of title is denied." It is sufficient to answer that the case before us is not such a case as the court below there described. This is not

a suit to try title to land. True, plaintiffs must show title in themselves as the basis for their possessory action, but the judgment sought does not involve title to land at all. This is purely a common law action in ejectment, as recognized and defined by Georgia's statutes, and involves merely a dispute between individuals for possession of the land.

The main reliance of the court below was the *Larson* case, as is the argument of appellees here. Before taking up discussion of that case we ought to consider the decision of the Supreme Court two years earlier in *Land, Chairman, United States Maritime Comm. et al.* v. *Dollar, et al.*, 1947, 330 U.S. 731.

Dollar was a case where members of the United States Maritime Commission had physical control of the property in question, but it was claimed by Dollar that the property was wrongfully withheld. The Supreme Court approved the principle that the trial court had authority to proceed on the merits in order to determine whether the plaintiff's claim that the withholding of the pledged property was, under the circumstances, tortious and therefore subject to relief against the agents as individuals. The court specifically applied the principles of *Lee* as they are reinforced by such cases as *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 1922, 258 U.S. 549; *Goltra* v. *Weeks*, 1926, 271 U.S. 536, and *Ickes* v. *Fox*, 1937, 300 U.S. 82. Mr. Justice Douglas, speaking for an unanimous court (Mr. Justice Black not participating), stated:

> Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States* v. *Lee, supra,* has been repeatedly approved. [Eight Supreme Court cases cited.] * * * In *United States* v. *Lee, supra,* record title of the land

was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not res judicata against the United States, page 222, it settled as between the parties the controversy over possession. * * *

We do not trace the principles of *United States* v. *Lee, supra,* in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. * * * It is not an attempt to get specific performance of a contract to deliver property of the United States. * * * It is not a case where the sovereign admittedly had title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress. * * *

* * * But the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The "essential nature and effect of the proceeding may be such as to make plain that the judgment sought would expend itself on the public treasury or domain or interfere with the public administration. * * * But public officials may become tort feasors by exceeding the limits of their authority. *And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the court of claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.*

It is in the latter category that the pleadings have cast this case. That is to say, if the alle-

> gations of the petition are true, the shares of stock never were the property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against the petitioners, though, as we have said, the judgment would not be res judicata as against the United States * * * *' [Emphasis added.]

In considering *Larson,* let it be understood that the opinion had the unconditional concurrence of only a minority of the Supreme Court, to-wit, Chief Justice Vinson and Justices Black, Reed and Murphy, all of whom, except Justice Black, had concurred in *Dollar.* Mr. Justice Douglas, author of *Dollar,* joined in the opinion only because the case involved the minutiae of the intricate machinery of sales by the world's largest merchant.[10] Mr. Justice Rutledge concurred in the result, while Justices Frankfurter, Jackson and Burton dissented, the dissenting opinion of Justice Frankfurter having been above referred to several times.

The majority opinion in *Larson* is susceptible of being construed as questioning some of the fundamental bases of *Lee.* As Mr. Justice Frankfurter

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[9] 330 U.S. pp. 737–739.

[10] His concurrence states: "I think the principles announced by the Court are the ones which should govern the selling of government property. Less strict application of those principles *would cause intolerable interference with public administration.* To make the right to sue the officer turn on whether by the law of sales title had passed to the buyer *would clog this governmental function with intolerable burdens.* So I have joined the Court's opinion." [Emphasis added.]

points out,[11] to ascribe to *Lee* the effect which some of the language of *Larson* would seem to justify would be to overrule, not only *Lee*, but many other Supreme Court cases, including landmark decisions by Mr. Justice Holmes, *Sloan Shipyards Corp.* v. *United States*, 1922, 258 U.S. 549, 567–568, and Chief Justice Taft, *Goltra* v. *Weeks*, 271 U.S. 536. The dissent quotes from the decision of Mr. Justice Holmes:

> The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take possession in certain events, but that the plaintiffs can show that the events had not occurred. [337 U.S. pp. 719–720.]

Larson is a suit for injunction and declaratory judgment against the head of the War Assets Administration upon which a restraining order was issued ex parte. The opinion stresses (page 686): "Nor was it claimed that the Administrator had any personal interest in this coal or, indeed, that he himself had taken any wrongful action." Injunctive relief was sought against the Administration for wrongs allegedly committed by its subordinate officials. The crucial paragraph in the *Larson* decision, the one which differentiates that case from the one before the Court below and which supports our holding here is this:

> Before answering that question it is perhaps advisable to state clearly what is and what is not involved. *There is not involved any ques-*

[11] 337 U.S. at pp. 718–720 et seq.

> *tion of the immunization of government officers against responsibility for their wrongful actions.* If those actions are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. 337 U.S. 686. [Emphasis added.]

The emphasized words describe exactly what is involved in this action. Appellants claim that appellee Malone is wrongfully and tortiously holding possession of their lands as agent for the United States, which does not have the right of such possession. We think that this is a valid and basic differentiation between *Larson* and this case.

We think it is significant also that the Supreme Court did not overrule *Lee* or *Dollar*, essaying merely to distinguish those cases from the *Larson* case. The special concurring opinion of Mr. Justice Douglas helps to clarify the scope and content of the differentiation. The fact that three Justices who, a scant two years before, had concurred in *Dollar*, also concurred in *Larson* carries a strong inference, we think, that they were not subscribing at all to a doctrine which would, in such a basic aspect, cut the ground from under *Dollar* and *Lee*. At all events, whatever language of *Larson* seems to conflict with *Lee* and *Dollar* is explainable under this pungent paragraph in Mr. Justice Frankfurter's dissent: [12]

> These cases likewise apply a principle that is clear. There is an appearance of inconsistency in some of the cases only because opinions also are prey to the frailties of composition. Familiar phrases are not always used with

[12] 337 U.S. 713.

critical precision or with due relevance to the circumstances of a particular case.

It is worthy of note also that, since *Larson, Lee* has been cited with approval in the concurring opinion of Mr. Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath, Attorney General, et al.*, 1951, 341 U.S. 123, 152; and also by him, speaking for an unanimous court,[11] in *Leiter Minerals, Inc.* v. *United States*, 1957, 352 U.S. 220, 226. *Dollar* has, since *Larson*, been cited with approval in the concurring opinion of Mr. Justice Douglas in *Georgia Railroad and Banking Co.* v. *Redwine, etc.*, 1952, 342 U.S. 299, 307. Neither *Lee* nor *Dollar* has been questioned by the Supreme Court in any subsequent opinion, as far as our search has revealed.

Larson has been quoted in the opinion of the Court by Mr. Justice Burton in *Anti-Fascist Committee* v. *McGrath, supra*, at page 140 as follows: "The respondents are not immune from such a proceeding. Only recently, this Court recognized that 'the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual * * * if it is not within the officer's statutory powers or, if within those powers * * * if the powers, or their exercise in the particular case, are constitutionally void.'"

Mr. Justice Frankfurter, dissenting in *Snyder* v. *Buck, Paymaster*, 1950, 340 U.S. 15, 29, cited his dissent in *Larson* and added further remarks con-

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[11] Mr. Justice Douglas dissented in part, 352 U.S. 220, but he concurred in the portion of the opinion in respect to which *Lee* was cited.

cerning the increasing disrepute of the doctrine of sovereign immunity.[14]

In summary, it is clear that, however broad the apparent sweep of the limitations placed upon *Lee* by some of the courts may be, the Supreme Court has never questioned its controlling validity in possessory actions like ejectment, seeking to oust the government's agents from wrongful possession growing out of their tortious or illegal acts. That is all this case involves. The unanimity with which the principles here approved have been upheld springs, doubtless, from the conviction that the implied immunity of the government itself should be extended to its agents only with great caution; and from the realization that the government, in such a suit as this, has the simple option of filing a counterclaim aimed at quieting its challenged title or of raising the same issues in an independent proceeding.

We hold that the action against appellee Malone is not foreclosed because he possesses the land as agent

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[14] "In scores of cases this Court has had to consider when a suit, though nominally against one holding public office, is in fact a suit against the Government and as such barred by want of the sovereign's consent to be sued. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, App. 729. The subject, it has been recognized, is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of sovereign immunity which—whatever its historic basis—is hardly a doctrine based upon moral considerations. The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine. See *Keifer & Keifer* v. *R.F.C.*, 306 U.S. 381, 390–392. If astuteness has been exercised to deny the representative character of an official in order to avoid his identification as the sovereign *ad hoc*, it runs counter to the rational administration of justice not to find an official the sovereign *ad hoc* and the suit against him, in effect, a suit against the sovereign when sovereign immunity is not circumscribed thereby."

for the government; and the judgment of the court below is reversed and the case is remanded for further and not inconsistent proceeding.

Reversed and Remanded.

RIVES, *Chief Judge,* Dissenting:

The district court's clear and able opinion reported in * * * F. Supp. * * * shows that "* * * counsel for the plaintiff admitted at the pre-trial conference today that the above quoted paragraphs 2 and 3 of the removal petition are true and correct."[1] From that admission, the district court correctly concluded: "It does now appear, therefore, that Malone does not purport to act in the premises as an individual but solely as an official or employee of the sovereign."[2] The appellants make no denial of any of these admis-

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[1] Those paragraphs read as follows:

"2. Before the commencement of this action and at all times hereinafter mentioned, petitioner Buford Malone, Jr., was a Forest Service Officer with the Forest Service, United States Department of Agriculture, and his official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit.

"3. At all times mentioned in said action, petitioner, Buford Malone, Jr., was acting solely under color of his office as a Forest Service Officer for the Forest Service, United States Department of Agriculture, and all his acts in connection with the matters charged in said complaint were committed by him under color of his said office."

[2] Later in the opinion, the district court said:

"Under the Larson decision if it were contended that Malone were acting beyond a statutory limitation upon his power, it would be necessary for the complaint to set out the statutory limitation upon which plaintiff relies. 337 U.S. 682, 690. Not only is there no such allegation, but *there is a solemn admission that his official duties as a forest service officer required him to be and that he was in charge and in possession of the land involved.*" [Emphasis supplied.]

sions of fact upon which the district court's opinion and judgment were based.

Malone might not be immunized from personal liability in damages, but a writ to oust Malone from the possession which he holds solely on behalf of the United States would interfere with governmental functions. It seems to me that the full discussion in *Larson* v. *Domestic and Foreign Corp.*, 1949, 337 U.S. 682, demonstrates that this action was properly dismissed as a suit against the United States to which it had not consented. See also, *Georgia R. Co.* v. *Redwine*, 1952, 342 U.S. 299, 304; *Leiter Minerals, Inc.* v. *United States*, 1957, 352 U.S. 220, 226; *Stewart* v. *United States*, 5 Cir., 1957, 242 F. 2d 49, 51; Hart and Wechsler, The Federal Courts and the Federal System, pp. 1169–1180. I respectfully dissent.

'A' true copy.

Test:

[SEAL] EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals,
Fifth Circuit,
New Orleans, Louisiana.

MAY 15, 1961.

Judgment

Extract From the Minutes of October 25, 1960

No. 18222

JAMES A. BOWDOIN, ET AL.

v.

BUFORD MALONE, JR., AND UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings.

"RIVES, *Chief Judge*, Dissenting."

In the United States Court of Appeals for the Fifth Circuit

No. 18222

JAMES A. BOWDOIN, ET AL., APPELLANTS

v.

BUFORD MALONE, JR., AND UNITED STATES OF AMERICA, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

February 23, 1961

On appellees' petition for rehearing and brief and supplemental brief in support thereof

Before RIVES, CAMERON and BROWN, *Circuit Judges*

PER CURIAM: Appellee Buford Malone, Jr., as Forest Service Officer, Department of Agriculture, has filed, through attorneys of the Department of Justice of the United States, a petition for rehearing, together with a brief in support thereof and a supplement to that brief, together with motion for leave to file the supplement. The motion is granted, and the supplemental brief has been considered by the Court.[1]

[1] The United States, which had entered its appearance and joined in Malone's motion to dismiss, has not joined in the petition for rehearing. The judgment entered pursuant to the

We reject without discussion the point raised in the supplement to appellee's brief. It brings to our attention certain correspondence between the attorneys for the parties.[1] This correspondence was not before the lower court and is not contained in the record of this appeal. It deals largely with facts which appellee Malone claims demonstrate that the present action is barred by limitations. The action was decided by the court below upon the face of the complaint filed by appellants and the motion to dismiss filed by appellee below, along with the United States.[2] That is all which was before the court below and which was involved in this appeal and we decline to consider the matters discussed in the supplemental brief of appellee Malone, as such a possible defense on the part of appellee was not before the court below and is not before us.

We pass over without discussion as having been sufficiently dealt with in our opinion three points made in the petition for rehearing,[3] and we confine this opinion to a response to the argument presented in Point IV of the petition for rehearing in which it is claimed that "The majority opinion is based upon

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opinion heretofore rendered in this case approved the judgment of the court below in dismissing the action insofar as the United States was concerned.

[2] The court below dealt with certain admissions which had been made in pretrial hearings. No question was raised as to whether these were properly before the court on the motion to dismiss, so that we raise no question, but have considered the admissions as included in the written opinion of the court below as being properly before the Court upon the motion to dismiss.

[3] That our opinion I 'regresses to the discredited view that whether a suit is against the United States is determined by its presence as a formal party defendant;" and that our opinion II is in conflict with the decisions of the Supreme Court, and III of this circuit and other circuits.

an erroneous premise as to Georgia law." We do this in part because of the statement in our opinion: "It is manifest from the Georgia statutes quoted and referred to, as well as the decisions cited, that the common law action of ejectment in Georgia involves possession alone, that the only process issuable to the victor is a writ of possession, together with damages, and that 'the writ of possession shall not issue against third persons not known in the suit on which such writ of possession is founded, * * *' "

That statement in the opinion meant, of course, that the common law action of ejectment in Georgia, as sought to be invoked and applied by the appellants in this case, involves possession alone. The quoted statement was followed by our statement in the opinion:

> The sole question presented, therefore, is one of law: is appellee Malone, under the admitted facts, entitled to have the action against him dismissed solely on the ground that he is protected by the asserted sovereign immunity of the United States?

That is an accurate statement of what was tried before the court below, what was decided by that court, and what was argued before us in the original presentation of this case. No contention was made that the action of ejectment here involved differed from the action of ejectment dealt with in *United States* v. *Lee,* 1882, 106 U.S. 196, and we made no effort to analyze the statutes and decisions of Georgia to demonstrate that the action of ejectment before the lower court and before us was identical in character and scope with the action involved in *Lee.*

The fact is that Ejectment, as dealt with in Title 33 of the Code of Georgia Annotated, is a comprehensive and flexible remedy. Assuming that, under the Georgia decisions relied upon by appellee in its peti-

tion for rehearing,[4] the remedy by ejectment has been expanded so as to permit suits to try title to land, there is nothing in any decision we have found which limits the remedy to such a class of actions. Many provisions of the statute reject the thought that the common law action of ejectment, an action at law, has been converted into an exclusively equitable action to quiet title to land, or even to try title.[5]

The opinion rendered by the court below, appearing in the record and now reported in * * * F. Supp. * * *, shows that its judgment dismissing the

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[4] *Vinson* v. *Cannon*, 1957, 213 Ga. 339, 341, 99 S.E. 2d 108, 109; *Lopez* v. *Downing*, 1872, 46 Ga. 120; *Brewster* v. *Wooldridge*, 1897, 100 Ga. 305, 306, 308–311, 28 S.E. 43, 44–45; *Bright* v. *City of Washington*, 1957, 57 G. App. 84, 86, 97 S.E. 2d 163, 164, certiorari denied; *Ramey* v. *O'Byrne*, 1904, 121 Ga. 516, 520, 49 S.E. 595, 597; and *Sweat* v. *Atlantic Coast Line R. Co.*, 5 Cir., 1936, 81 F. 2d 492, 493.

[5] E.G., § 103 of the chapter vests the right to maintain the action in a single joint tenant or other person claiming only a part interest in the lands involved without joining any other person with him, with the proviso that the judgment shall "not affect the rights of those interested in such lands or tenements who are not parties to the suit." § 114 gives the plaintiff the right to make the true claimant defendant and to bind him by the judgment. § 115 confers the right in the plaintiff to make a previous warrantor of title to the land a codefendant. § 120 gives the right to the plaintiff to have a writ of possession against the defendant, including a money judgment for mesne profits. And § 121 denies the right of plaintiff to obtain a writ of possession against third persons "not known in the suit." Implicit in the whole chapter and the decisions under it is the rule that the plaintiff may choose whom he shall sue and his judgment will be binding only upon the person or persons properly brought before the court.

In one of the cases relied upon by the appellee, *Ramey* v. *O'Bryne*, 121 Ga. 516, 49 S.E. 595, 597, the Supreme Court of Georgia refers to ejectment as a mixed action partly for tort, and partly for trial of title. And see also *Nottingham* v. *Elliot*, S. Ct. Ga. 1953, 209 Ga. 481, 74 S.E. 2d 93.

action was predicted upon the petition of appellee Malone alone, stating: "Plaintiff frankly concedes that he cannot maintain this action against the United States itself;" and the decision was rendered in favor of Malone solely on the basis that, in possessing the land, he was acting as agent of the United States, which had not consented to be sued. While the petition for rehearing and the briefs filed in support thereof are somewhat confused, the real contention presented is that the United States was an indispensable party and that the action ought to have been dismissed by the court below on the ground that the suit could not proceed without bringing the United States in.

One of the cases chiefly relied upon to sustain that position is our recent decision in *Stewart* v. *United States,* 1957, 242 F. 2d 49. We do not think that appellee's position is sound. *Stewart* involved an action seeking to quiet title generally against all the world.[6] We held that, in such an action, the United States, through whom the others were claiming title, was an indispensable party, basing our holding largely on our prior cases of *Hudson* v. *Newell,* 1949, 172 F. 2d 848, and cases cited, and *Mackintosh* v. *Marks' Estate,* 1955, 225 F. 2d 211. We stated the general rule concerning indispensable parties to be:[7]

> It is well settled under the decisions of this Court that no decree can be entered affecting

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[6] See 242 F. 2d p. 50: "The amended complaint prayed that title to the described mineral interests be quieted in plaintiffs, that all clouds and encumbrances be cancelled, that the condemnation proceedings [by which the United States acquired the title which it passed on, as far as the minerals were concerned, to Placid Oil Company and others] be reviewed and corrected, that the oil and gas leases be cancelled and declared void, and that the parties be enjoined from performing them."

[7] 242 F. 2d 51.

> the title to property or cancelling any cloud thereon unless all of the parties interested in the title or in the particular cloud and who will be directly affected by any judgment that may be rendered are properly before the Court.

In *Hudson* v. *Newell* we reversed the action of the lower court in dismissing a suit to quiet title generally to certain lands, as provided by Mississippi statutes using this language:

> If they can prove the land and oil are theirs we see no reason why they should not have judgment for them against those sued; possible claimants not in court would not of course be bound by the result. If such claimants' title is shown as a defense their interests can be saved from the decree. * * *
>
> We therefore hold that while the full relief prayed cannot be given with only the parties before the court a limited relief can be, and the suits should be retained to enquire into it.[6]

In *Mackintosh,* we cited *Hudson, supra,* as authority and held:

> Plaintiffs are entitled to any relief which the facts justify even though that relief has not been asked and that theory has not been advanced in the pleadings. * * *
>
> The first reason is that the rights of the royalty owners would continue to exist irrespective of the outcome of the present suit. The royalty owners who deraign their title from the appellants are protected under their warranty of title, both express and implied. * * *
>
> * * * The power of a court of equity so to mold its decree as to do complete justice between the parties without adversely affecting those not before the court is exceedingly broad and elastic. * * *

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[6] 172 F. 2d pp. 851 and 853.

> * * * the court should retain jurisdiction and limit any relief granted to such as can be given without prejudice to the absent parties. 225 F. 2d at 214–215.

Certainly, under these decisions, the United States was not an indispensable party here. It had been eliminated in effect by consent. It is difficult to discern what relief was sought against the United States by the common law complaint in ejectment in the John Doe proceeding. Taking the averments of that complaint, as supplemented by the statement of the court below that plaintiffs (appellants) conceded that the suit against the United States could not be maintained as true, we think it is clear that, under *Lee,* a judgment can be entered by the court below which will grant appellants some relief without adversely affecting the interests of the United States. In fact, this was in effect conceded by the appellee in the original brief.*

At several times in the petition for rehearing, the appellee claims that title was put in issue by the denial of appellants' title by appellees. Of course, there was no responsive pleading at all, and the averments of the complaint must be taken as true in passing upon the motion to dismiss.

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*In which this statement appears on page 10: "While the United States would not be bound by a judgment against Malone, its interests in managing the property would be affected and a doubt would be cast upon its title until directly litigated by the United States with the appellants." Such an incidental impact upon the interests of the United States would not make it an indispensable party, and the same contention was directly rejected in Lee.

The petition for rehearing is denied.
RIVES, *Circuit Judge:* I dissent.
A true copy.
Test:
[SEAL] EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals,
Fifth Circuit,
New Orleans, Louisiana.
MAY 15, 1961.

Order denying rehearing

Extract From the Minutes of February 23, 1961

No. 18222

JAMES A. BOWDOIN, ET AL.

v.

BUFORD MALONE, JR., AND UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * * * *